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The Right to Counsel—Time for Recognition Under the Due Process Clause

Felix Rackow

THOSE WHOSE business it is to follow the proceedings of the United States Supreme Court should be grateful for the fact that the members of the Court have seen fit to give us an unequivocal statement of what the right to counsel means under the sixth amendment. Ever since the decision of *Johnson v. Zerbst*¹ in 1938, the provision that "in all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence" means that federal courts lose their jurisdiction over the defendant if he does not have counsel.

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However, the clarity disappears when one wishes to determine whether the United States Constitution

guarantees defendants in the state courts the same right to counsel. The Constitution, of course, does not expressly state such a right, but those who believe that "right to counsel" exists in state courts are of the opinion that it has been incorporated into the due process clause of the fourteenth amendment. It is not the purpose of this study to examine the question of whether or not those in Congress who proposed the fourteenth amendment and those who voted in the state legislatures in favor of its ratification intended by their votes to make the Bill of Rights applicable to the states. Much scholarship has already been expended on this point, and little can be said that has not already been brought out.² It is sufficient to say that up to and including the present time there has never been a majority on the Supreme Court that would hold that the

1. 304 U.S. 458 (1938).

2. See, e.g., on the positive side, FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT (1908); Justice Black's dissent in *Adamson v. California*, 332 U.S. 46, 68-123 (1947). On the negative side, see Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?—The Original Understanding*, 2 STAN. L. REV. 5 (1949); Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights?—The Judicial Interpretation*, 2 STAN. L. REV. 140 (1949). For an excellent discussion of the futility of this line of investigation, see Charles Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 HARV. L. REV. 431-65 (1926).

provisions of the first eight amendments were incorporated into the fourteenth.³ Nevertheless, the constitutional right of a defendant in a state court to have the assistance of counsel is dependent upon the due process clause of the fourteenth amendment, and a study of the relationship between the two is the object of this paper.

FOURTEENTH AMENDMENT — THE ABSORPTION OF FUNDAMENTAL RIGHTS

The rule of law established in *Barron v. Baltimore*,⁴ viz., that the first eight amendments are limitations on the authority of the federal government and have no application to the states, is still sound law today. In the light of this rule, the Supreme Court has refused to make the following provisions of the Bill of Rights applicable to the states: the right to a grand jury indictment;⁵ the right to a trial by jury;⁶ protection against compulsory self-incrimination;⁷ and protection against double jeopardy.⁸

On the other hand, ever since the Supreme Court announced its decision in *Gitlow v. New York*⁹ in 1925, the Court has incorporated other provisions contained in the Bill of Rights into the "liberty" that is protected by the due process clause of the fourteenth amendment. Among these are: freedom of speech;¹⁰ freedom of religion;¹¹ freedom of the press;¹² freedom to assemble peaceably;¹³ and the right to be protected from unreasonable searches and seizures.¹⁴ In addition, certain practices which are required under the due process clause of the fifth amendment are also required under that of the fourteenth. Among these are: the right to have fair compensation for private property condemned through

3. *Adamson v. California*, 332 U.S. 46 (1947); *Twining v. New Jersey*, 211 U.S. 78 (1908); *Maxwell v. Dow*, 176 U.S. 581 (1900).

4. 7 Peters (U.S.) 243 (1833).

5. *Hurtado v. California*, 110 U.S. 516 (1884).

6. *Maxwell v. Dow*, 176 U.S. 581 (1900).

7. *Twining v. New Jersey*, 211 U.S. 78 (1908).

8. *Palko v. Connecticut*, 302 U.S. 319 (1937). Justice Cardozo, however, did not completely close the door. The sentence "What the answer would have to be if the state were permitted after a trial free from error to try the accused over again or to bring another case against him, we have no occasion to consider," may someday provide the peg for including the protection against double jeopardy within the meaning of due process.

9. 268 U.S. 652 (1925).

10. *Gitlow v. New York*, 268 U.S. 652 (1925).

11. *Hamilton v. University of California*, 293 U.S. 245 (1934).

12. *Grosjean v. American Press Co.*, 297 U.S. 233 (1936).

13. *De Jonge v. Oregon*, 299 U.S. 353 (1937).

14. *Wolf v. Colorado*, 338 U.S. 25 (1949).

eminent domain actions;¹⁵ the right of an accused to be heard in his own defense;¹⁶ and the right to adequate notice and hearing.¹⁷

In the *Gilow* case, Justice Sanford states for the Court that "for present purposes we may and do assume that freedom of speech and of the press — which are protected by the First Amendment from abridgement by Congress — are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."¹⁸ If *Barron v. Baltimore* is still the law of the land, it is understandable that the Supreme Court has refused to state that all the provisions of the Bill of Rights are protected by the Federal Constitution from being abridged by the states. But, then, is the Court being inconsistent in view of the fact that since the *Gilow* case the Court has ruled that the states cannot abridge the freedoms of the first amendment? The Supreme Court asserts this is not inconsistent. According to the Court it is merely coincidental that these latter rights, which the states are prohibited from denying, are also protected from Federal abridgement by virtue of the Bill of Rights; for the protection against state abridgement rests upon a different principle.

The answer to the Court's pseudo-contradiction is found in a long line of decisions, but the principal cases for our purpose are *Hebert v. Louisiana*¹⁹ and *Palko v. Connecticut*.²⁰ In the *Hebert* case, a unanimous Court expounded that the due process of law clause of the fourteenth amendment merely required that state action be "... consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as 'law of the land.'"²¹

In *Palko v. Connecticut*, the appellant alleged that the fourteenth amendment incorporated all the provisions of the first eight amendments, heretofore directed only to the Federal Government, and thus, made them

15. *Chicago B. & Q. R.R. Co. v. Chicago*, 166 U.S. 226 (1897).

16. *Holden v. Hardy*, 169 U.S. 366 (1898).

17. *Twining v. New Jersey*, 211 U.S. 78 (1908).

18. *Gilow v. New York*, 268 U.S. 652, 666 (1925). Cf. Justice Harlan's dissent in *Patterson v. Colorado*, 205 U.S. 454, 465 (1907): "I go further and hold that the privileges of free speech and of a free press, belonging to every citizen of the United States, constitute essential parts of every man's liberty, and are protected against violation by that clause of the Fourteenth Amendment forbidding a state to deprive any person of his liberty without due process of law. It is, I think, impossible to conceive of liberty, as secured by the Constitution against hostile action, whether by the Nation or by the States, which does not embrace the right to enjoy free speech and the right to have a free press."

19. 272 U.S. 312 (1926).

20. 302 U.S. 319 (1937).

21. *Hebert v. Louisiana*, 272 U.S. 312, 316-17 (1926).

applicable to the states. Justice Cardozo, speaking for the majority, rejected this thesis, and expanded on the formula announced in the *Hebert* case. He distinguished between those rights which constitute "fundamental principles of liberty and justice" and those which base their existence merely on the fiat of some constitutional or statutory provision. In the latter group he placed grand jury indictment, compulsory self-incrimination, jury trial, and double jeopardy;²² in the former, the provisions of the first amendment and the right to counsel.²³ "The right to trial by jury and the immunity from prosecution except as the result of an indictment may have value and importance. Even so, they are not of the very essence of a scheme of ordered liberty. To abolish them is not to violate a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental' . . . Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them."²⁴ However, when we come to the other group, we find that they are included within the meaning of the due process clause of the fourteenth amendment because "few would be so narrow or provincial as to maintain that a fair and enlightened system of justice" would be *possible* without them. Thus,

. . . it is possible that some of the rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law . . . If this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law.²⁵

"If the Fourteenth Amendment had absorbed them [first eight amendments], the process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed."²⁶

RIGHT TO COUNSEL — A FUNDAMENTAL RIGHT?

The question then is, on which side of the dividing line does the right to counsel fall? Is the right to counsel "of the very essence of a scheme of ordered liberty" or is it such that "few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without [it]?" Although there are some *obiter dicta* (as in the *Palko* case) that place the right to counsel in the

22. *Palko v. Connecticut*, 302 U.S. 319, 323-4 (1937).

23. *Id.* at 324, 326-27.

24. *Id.* at 325.

25. *Id.* at 326, citing Justice Moody in *Twining v. New Jersey*, 211 U.S. 78, 99 (1908).

26. *Ibid.*

"fundamental" group,²⁷ the Supreme Court answers the question by saying that ordinarily the right to counsel is not fundamental to liberty. It is ironic, therefore, that while the Court adopted the principle Justice Cardozo used in making his classification, it has rejected his conclusion in placing the right to counsel within the "fundamental" class. Nevertheless, under the circumstances of a particular case, the deprivation of the right to counsel may result in a fundamental unfairness, and when it does, such deprivation does violate due process in the fourteenth amendment.

Reasoning that a hearing before conviction is basic to due process, and that a prisoner without the aid of counsel does not get the full benefit of a hearing, the Supreme Court declared in *Powell v. Alabama* that "a consideration of the nature of the right [to counsel] and a review of the expressions of this and other courts, makes it clear that the right to the aid of counsel is of this fundamental character [so as to warrant it being included within the due process clause of the fourteenth amendment]."²⁸ This sweeping declaration, however, was severely limited in *Betts v. Brady*²⁹ and *Bute v. Illinois*.³⁰ In the *Betts* case the Court faced the specific question with which we are concerned: "whether due process of law demands that in every case, whatever the circumstances, a State must furnish counsel to an indigent defendant. Is the furnishing of counsel in all cases whatever dictated by natural, inherent, and fundamental principles of fairness?"³¹ Justice Roberts made an historical survey of the practice of the American colonies and the states and concluded, that while the states permitted defendants the assistance of self-chosen counsel, the evidence indicated that the states generally did not feel obligated to assign counsel to the defendant as a matter of constitutional right. He then wrote that

... the Fourteenth Amendment prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right, and while want of counsel in a particular case may result in a conviction lacking such fundamental fairness, we cannot say that the Amendment embodies an inexorable command that

27. *Palko v. Connecticut*, 302 U.S. 319, 324 (1937); *Brown v. Mississippi*, 297 U.S. 278, 285-6 (1936); *Grosjean v. American Press Co.*, 297 U.S. 233, 244 (1936); *Powell v. Alabama*, 287 U.S. 45, 68 (1932); *Cooke v. United States*, 267 U.S. 517, 537 (1925).

28. 287 U.S. 45, 68 (1932). This statement must be considered *dictum*, as the *Powell* decision was expressly limited to capital cases where the defendant was incapable of defending himself. *Id.* at 71.

29. 316 U.S. 455 (1942).

30. 333 U.S. 640 (1948).

31. *Betts v. Brady*, 316 U.S. 455, 464 (1942).

no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel.³²

Thus the Court enunciated its view of due process as requiring no more than a fair trial, which may or may not under a particular circumstance require counsel. Six years later the Supreme Court said essentially the same thing in *Bute v. Illinois*.³³

A review of the cases in which the Supreme Court has reversed convictions in the state courts because of the denial of counsel indicates that the Court has consistently followed its "fair trial" rule. The Court has reversed only when there were unusual circumstances present that rendered the proceedings a violation "of the very essence of a scheme of ordered liberty." Thus, when the issues are so complex that an uncounseled defendant would not be accorded a fair trial, the court must appoint counsel to aid the defendant.³⁴ Assignment must be made when the defendant is charged with a serious offense, especially when the offense may result in capital punishment.³⁵ When a defendant, who is without counsel, does not have his interests protected by the court, then a conviction under such circumstances would deny due process.³⁶ The inadvertent or intentional deception by officers or the court will taint the conviction of an uncounseled defendant.³⁷ The Supreme Court has reversed the convictions of defendants without counsel, when they did not progress very far in schooling,³⁸ when they were semi-illiterate,³⁹ or when they suffered from mental disorders.⁴⁰ The court is more solicitous in seeing to it that young people are defended by counsel than it is in

32. *Id.* at 473. "That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial." *Id.* at 462.

33. *Bute v. Illinois*, 333 U.S. 640, 656-9 (1948), citing *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

34. *Moore v. Michigan*, 355 U.S. 155 (1957); *Pennsylvania ex rel. Herman v. Claudy*, 350 U.S. 116 (1956); *Rice v. Olson*, 324 U.S. 786 (1945); *Tomkins v. Missouri*, 323 U.S. 485 (1945); *William v. Kaiser*, 323 U.S. 471 (1945).

35. *Moore v. Michigan*, 355 U.S. 155 (1957); *Marino v. Ragen*, 332 U.S. 561 (1947); *De Meerleer v. Michigan*, 329 U.S. 663 (1947); *Tomkins v. Missouri*, 323 U.S. 485 (1945); *Williams v. Kaiser*, 323 U.S. 471 (1945).

36. *Gibbs v. Burke*, 337 U.S. 773 (1949).

37. *Palmer v. Ashe*, 342 U.S. 134 (1951); *Townsend v. Burke*, 334 U.S. 736 (1948); *Smith v. O'Grady*, 312 U.S. 329 (1941).

38. *Moore v. Michigan*, 355 U.S. 155 (1957); *Herman v. Claudy*, 350 U.S. 116 (1956).

39. *Reece v. Georgia*, 350 U.S. 85 (1955); *Powell v. Alabama*, 287 U.S. 45 (1932).

40. *Massey v. Moore*, 348 U.S. 105 (1954); *Palmer v. Ashe*, 342 U.S. 134 (1951).

respect of older defendants.⁴¹ Although the right to counsel may be waived by the defendant, the record must indicate that it was done so intelligently.⁴² It would abridge due process if a defendant is not given the opportunity to provide counsel at his own expense,⁴³ and counsel must be allowed to be present at every stage of the proceedings.⁴⁴

The attitude of the majority of the Supreme Court has been well summarized by Justice Frankfurter:

It is not for us to suggest that it might be desirable to offer to every accused . . . the opportunities for counsel and to enter with formality upon the record the deliberate disclaimer of his need for counsel. . . . Our duty does not go beyond safeguarding "rights essential to a fair hearing" by the States. After all, due process . . . is not to be turned into a destructive dogma in the administration of systems of criminal justice under which the States have lived not only before the Fourteenth Amendment but for the eighty years since its adoption.⁴⁵

That the "fair trial" rule is at best an indefinite standard, subject to many interpretations, is of no concern to the Court's majority. Justice Reed noted that it was not up to the Supreme Court to change its decisions because state prosecuting authorities are "uncertain as to whether to offer counsel to all accused who are without funds and under serious charges in state courts. We cannot offer a panacea for the difficulty. Such an interpretation would be an unwarranted federal intrusion into state control of its criminal procedure. The due process clause is not susceptible to a mathematical formula."⁴⁶ And, returning to Justice Frankfurter, "After all, this is the Nation's ultimate judicial tribunal, not a super-legal-aid bureau."⁴⁷

However, a consistently large minority⁴⁸ of the Supreme Court refuses to accept the reasoning of the majority. Rejecting the "fair trial" rule, some would go so far as to say that fourteenth amendment incorporates all the provisions of the first eight amendments, and thus makes them applicable to the states as well as the federal government.⁴⁹ Others would

41. *Moore v. Michigan*, 355 U.S. 155 (1957); *Uveges v. Pennsylvania*, 335 U.S. 437 (1948); *Wade v. Mayo*, 334 U.S. 672 (1948); *Powell v. Alabama*, 287 U.S. 45 (1932).

42. *Moore v. Michigan*, 355 U.S. 155 (1957).

43. *Chandler v. Freitag*, 348 U.S. 3 (1954); *Hawk v. Olson*, 326 U.S. 271 (1945); *House v. Mayo*, 324 U.S. 42 (1945).

44. *Chessman v. Teets*, 354 U.S. 156 (1957).

45. *Foster v. Illinois*, 332 U.S. 134, 138-9 (1947).

46. *Gibbs v. Burke*, 337 U.S. 773 (1949).

47. Dissenting in *Uveges v. Pennsylvania*, 335 U.S. 437, 449-50 (1948).

48. This minority reached its peak strength during the years that Justices Black, Douglas, Murphy, and Rutledge served on the Court together.

49. *Adamson v. California*, 332 U.S. 46, 71-2, 124 (1947).

go at least as far as to place the right to counsel on that side of the dividing line which would require under due process that whenever an uncounseled indigent defendant appears in the state courts to answer a criminal charge, the courts must assign counsel before the action can proceed.⁵⁰

The minority members of the Court refer to the reasoning in *Powell v. Alabama* to the effect that "[E]ven the intelligent and educated layman has small and sometimes no skill in the science of law. . . . He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."⁵¹ Indeed, this was the reasoning adopted by the majority in *Johnson v. Zerbst* which made such an assignment mandatory in the federal courts:

The Sixth Amendment guarantees that 'In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.' This is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty. . . . It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel. That which is simple, orderly and necessary to the lawyer — to the untrained layman — may appear intricate, complex and mysterious. Consistently with the wise policy of the Sixth Amendment and other parts of our fundamental charter, this Court has pointed to ' . . . the humane policy of the modern criminal law. . . ' which now provides that defendant ' . . . if he be poor, . . . may have counsel furnished him by the state . . . not infrequently . . . more able than the attorney for the state.'⁵²

The rationale behind all this, the minority believes, is not so much that counsel is required in federal courts because of the Sixth Amendment, but that counsel is required because a hearing — with the aid of coun-

50. In *Palmer v. Ashe*, 342 U.S. 134 (1951), Justice Black states: "It was pointed out in the *Uveges* opinion that the minority of the Court believe that the Fourteenth and Sixth Amendments require both state and federal courts to afford defendants in all criminal prosecutions the assistance of counsel for their defense." See Justice Douglas' dissent in *Bute v. Illinois*, 333 U.S. 640 (1948); Justice Rutledge's dissent in *Foster v. Illinois*, 332 U.S. 134 (1947); Justice Murphy's dissent in *Canizio v. New York*, 327 U.S. 82 (1946); and Justice Black's dissent in *Betts v. Brady*, 316 U.S. 455 (1942).

The many changes in the Court since the deaths of Justices Murphy and Rutledge may have altered this division. Justices Black and Douglas still believe in reversing the *Barron* rule and making the Bill of Rights applicable to the States. It is interesting to note that Chief Justice Warren cast his vote for the defendant in all seven of the right to counsel cases in which he participated, as did Justices Brennan and Whitaker who took part in three and two right to counsel cases respectively.

51. *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

52. *Johnson v. Zerbst*, 304 U.S. 458, 462-3 (1938).

sel — is required by due process of law; the right to counsel clause of the sixth amendment, therefore, is really an implementation of the fifth. If this is so, then Justice Douglas can say that:

I do not think that constitutional standards of fairness depend upon what court an accused is in. . . . If due process as defined in the Bill of Rights requires appointment of counsel to represent defendants in federal prosecutions, due process demands that the same be done in state prosecutions. The basic requirements for fair trials are those which the Framers deemed so important to procedural due process that they wrote them into the Bill of Rights and thus made it impossible for either legislatures or courts to tinker with them. I fail to see why it is due process to deny an accused the benefit of counsel in a state court when by constitutional standards that benefit could not be withheld from him in a federal court.⁵³

Moreover, the minority believes that to follow the "fair trial" rule of the majority means that "[p]overty or wealth will make all the difference in securing the substance or only the shadow of constitutional protection."⁵⁴ In *Avery v. Alabama* a unanimous Court held that "[h]ad petitioner been denied any representation of counsel at all, such a clear violation of the Fourteenth Amendment's guaranty of assistance of counsel would have required reversal of his conviction."⁵⁵

Two years later, in *Betts v. Brady*, the majority concluded that the right to counsel provisions in the early state constitutions merely meant that a defendant could have counsel if he supplied his own.⁵⁶ This aspect of the right to counsel is, of course, important, but the minority believes that it does not go far enough: if it would abridge due process to deny an accused the assistance of counsel when he can afford to purchase such assistance, democratic procedure and logic also demand that the state be required to assign counsel to the indigent. "A practice cannot be reconciled with 'common and fundamental ideals of fairness and rights,' which would subject innocent men to increased dangers of conviction merely because of their poverty."⁵⁷

The *Chandler* case⁵⁸ seems to support the minority's contention that under the "fair trial" rule there is a correlation between the definition of "fair" and the wealth of the defendant. In this case, the Supreme Court unanimously reversed the defendant's conviction as an habitual criminal because the Tennessee courts denied him the opportunity to supply his own counsel. Chandler had been indicted on a charge of housebreaking

53. *Bute v. Illinois*, 333 U.S. 640, 678-9 (1948); dissent by Justice Douglas.

54. Justice Rutledge dissenting in *Foster v. Illinois*, 332 U.S. 134, 142 (1947).

55. 308 U.S. 444, 445 (1940).

56. 316 U.S. 455, 465 (1942).

57. Justice Black dissenting in *Betts v. Brady*, 316 U.S. 455, 476 (1942).

58. *Chandler v. Fretag*, 348 U.S. 3 (1954).

and larceny, an offence punishable by three to ten years. On the day of his trial, he was ready to plead guilty and "felt that an attorney could do him no good on said charge." At his trial, the judge orally told him that he would also be tried as a habitual criminal because of three alleged prior felonies and that conviction of the second charge carried a mandatory life sentence with no possibility of parole. Chandler immediately asked for a continuance so that he could obtain counsel on the habitual criminal charge. This was refused, the jury was impanelled, and less than ten minutes later, Chandler was found guilty on both charges. All the Tennessee courts upheld the conviction, emphasizing the point that the Habitual Criminal Act did not create a separate offense but merely increased the punishment upon a defendant's conviction of a fourth felony; thus, a waiver of counsel on the fourth offense also constituted a waiver on the habitual criminal charge. The Supreme Court reversed the Tennessee courts. Pointing out that the Act called for a jury determination, in a judicial hearing, of the habitual criminal charge, the Court noted that the two "are essentially independent of each other" and may require separate defenses. Since the defendant asked for a continuance to obtain counsel to assist him in the habitual criminal charge as soon as he heard of the charge, it is clear that he did not waive counsel for the second charge. Due process requires that the defendant be given an opportunity to be heard. A corollary is that he must also be given the opportunity to employ counsel and consult with him. In short, the due process clause of the fourteenth amendment guarantees you the right to have the assistance of counsel, if you can afford to employ one; if you are indigent, however, the same clause requires the assignment of counsel only when the Supreme Court is willing to say that the trial was unfair without such assistance.

While the minority applaud the fact that the majority of the Court agree that due process requires that state courts appoint counsel to assist indigent defendants when a capital offense is involved,⁵⁹ the minority also believes that assignment of counsel is required when less serious charges are made. The majority anticipated this attack declaring that to apply the federal rule to state court procedure would mean that the states would not be able to distinguish between a traffic violation and a capital charge when a defendant requests that counsel be assigned.⁶⁰ To this Justice Douglas replies that:

[I]t might not be nonsense to draw the *Betts v. Brady* line somewhere between that case and the case of one charged with violation of a parking ordinance, and to say that accused is entitled to counsel in the for-

59. See note 35, *supra*.

60. *Betts v. Brady*, 316 U.S. 455, 473 (1942).

mer but not in the latter. But to draw the line between this case [involving twenty years imprisonment] and cases where the maximum penalty is death, is to make a distinction which makes no sense in terms of the absence or presence of *need* for counsel. Yet it is the *need* for counsel that establishes the real standard for determining whether the lack of counsel rendered the trial unfair.⁶¹

The minority views notwithstanding, the fact remains that the Supreme Court still adheres to the "fair trial" rule, and this in turn means that the right to counsel is not of such a fundamental nature that it falls within the meaning of the "liberty" that is protected by the due process clause of the fourteenth amendment. Under certain circumstances due process may be abridged if a defendant does not have the aid of counsel; but this is not enough to establish that due process requires that the states assign counsel to all indigent defendants accused of crime. Although the majority of the members of the Supreme Court believe that in the federal courts "[t]he right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial,"⁶² the Supreme Court is willing to make such calculations in criminal cases arising in the state courts.

WHY RIGHT TO COUNSEL?

Fundamentally there are two reasons for the existence of a right to counsel although they are really different aspects of the same problem.

First, an assumption underlying the right to counsel is that the layman needs protection from the complexities of the legal system under which he lives. The defendant may be ignorant of the rights that are granted to him by the legal system, and he therefore needs the guidance of one who is trained in the law to guard against the involuntary waiver of such rights. Moreover, even if the defendant does know of his legal rights, he may become so hopelessly confused in following the different paths of the law that he may unintentionally lose the advantages that our accusatorial system of law affords him. Unless trained in the law, one accused of crime may not be able to understand the technicalities of the indictment, nor whether it is sufficient. Furthermore, the defendant may not know of the possible defenses to the crime for which he is charged. One accused of murder probably knows whether or not he killed someone, but does he know of such mitigating circumstances as justifiable homicide, or how to raise the defense of insanity? Does he know that self-defense is raised under a plea of not guilty, or that sufficient provocation may reduce the offense to voluntary manslaughter? The lay defendant probably would not be able to recognize hearsay evidence even

61. Justice Douglas dissenting in *Bute v. Illinois*, 333 U.S. 640, 682 (1948).

62. *Glasser v. United States*, 315 U.S. 60, 76 (1942).

if he knew what it was; nor would he know how to cross-examine or attack the credibility of the prosecution's witnesses. He would not know how to move to set aside the verdict, to move for a new trial, or to move for an appeal. Thus, unless trained in the law, a defendant may not know how to put into motion the machinery of the court that will give him the compulsory processes to which he is entitled.

A *second* assumption behind the right to counsel is that the layman accused of crime needs protection from overzealous prosecutors. It is a common observation that district attorneys, elected to their offices, believe that the voters judge their careers on the basis of the number of convictions they obtain. All too frequently, the district attorneys are correct in their estimate of the electorate's voting habits. It follows, then, that the more convictions district attorneys are able to win, the more successful they think they are. Unfortunately, it is too easy for them to fail to recognize reasonable doubt when they see it. In 1940, the following testimony was presented to a subcommittee of the Senate Committee of the Judiciary:

Senator Van Nuys. I suppose you will agree that it is as much the duty of the judges and the district attorneys to defend the innocent as it is to prosecute the guilty?

Mr. Sitnick. Yes, sir; and in that connection I spoke to a prosecutor just the other day. We were discussing this very matter, and I told him that was his duty; that an innocent man should not be prosecuted.

Senator Van Nuys. He should not be indicted.

Mr. Sitnick. No. "Well," this prosecutor said, "a man cannot be on both sides of the fence at the same time. It is only human nature. I am paid to prosecute people, and that is exactly what I am doing. My feelings about the matter are immaterial."⁶³

If this is the attitude, then, defendants are very much in need of the assistance of counsel to see that courts render them the justice to which they are entitled.

ANOTHER VOICE WITH THE MINORITY

In concluding this study of the right to counsel as it is or is not guaranteed by the due process clause of the fourteenth amendment, the author would like to add his voice to that of the minority of the Supreme Court that objects to the "fair trial" rule as a guide to the interpretation of the due process clause, at least in respect to the right to counsel.

We have seen that, following the rule of *stare decisis*, the majority refuse to overrule the doctrine of *Barron v. Baltimore*⁶⁴ so as to make

63. Hearing before a Subcommittee of the Senate Committee on the Judiciary on S.1845 and S.2871, *Public Defender for the District of Columbia*, 76th Cong., 3rd Session 45 (1940).

64. 7 Peters (U.S.) 243 (1833).

the first eight amendments applicable to the states. Instead, the Court continues to subscribe to the rule of the *Hebert* case⁶⁵ which states that all that the fourteenth amendment requires "is that the state action . . . shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as 'law of the land.'"⁶⁶ Behind the *Hebert* decision is that of *Hurtado v. California*⁶⁷ for it was in the *Hurtado* case that the formula for distinguishing between the "fundamental" and not-so-fundamental rights was laid down. The reasoning in the *Hurtado* case was that since no part of the Constitution can be said to be superfluous, the Founding Fathers could not have meant the right to indictment by grand jury to be included within the meaning of the due process clause of the fifth amendment, as earlier in the amendment such an indictment was specifically mentioned. Since due process in the fourteenth amendment means exactly the same thing as due process in the fifth, it could not be said that the fourteenth amendment guaranteed grand jury indictment to those immeshed in the state courts.

It is submitted, however, that the minority members of the Court are guilty of a tactical error every time they try to get the majority to overrule the *Barron* case and all that it implies. The principle of stare decisis can still be maintained, and at the same time, by changing to a different tack, the desired end can be obtained. It is not startlingly new to point out that the *Hurtado* doctrine has been severely limited ever since the Court decided *Gilow v. New York*⁶⁸ in 1925, and announced to the world that freedom of speech was a fundamental right that was protected from state abridgment by the due process clause of the fourteenth amendment. It seems, however, that this fundamental right of free speech was not considered so fundamental to the Founding Fathers as Justice Sanford would have us believe; it has long since been pointed out "that the right of free speech was not included as one of a person's fundamental and inalienable rights in any Bill of Rights adopted by any of the States prior to the Federal Constitution. . . . The right to freedom of speech in general, as a separate guaranty, was *created* for the first time in this country by the First Amendment to the Constitution."⁶⁹ Since the first breach of the *Hurtado* doctrine, the Court has incorporated into the liberty of the fourteenth amendment freedom of religion, presses, assembly, and the right to be protected from unreasonable searches and seizures. The

65. *Hebert v. Louisiana*, 272 U.S. 312 (1926).

66. *Id.* at 316.

67. 110 U.S. 516 (1884).

68. 268 U.S. 652 (1925).

69. Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 HARV. L. REV. 460-1 (1926).

Hurtado doctrine has been limited in other cases as well, particularly in the direction of incorporating substantive economic rights into due process.⁷⁰ The Court stepped out in the right direction in 1932 when, in *Powell v. Alabama*⁷¹ it included the right to counsel as a fundamental right protected by due process; since then, however, the majority has taken a step backwards by limiting the application of the *Powell* rule. In even a more direct frontal attack, the Court stated in reference to jury trials that "the two provisions [article III, and the sixth amendment] mean substantially the same thing."⁷² Here then is a situation where one part of the Constitution could be said to be superfluous, despite the contrary reasoning in the *Hurtado* case. Here is precedent which could make way for the Court to rule that due process of the Fifth amendment includes the right to counsel and requires assignment of counsel to indigent defendants in *all* cases. It could be further argued, that due process under the fifth and fourteenth amendments mean essentially the same thing. Thus the states too would be required to assign counsel to indigent defendants in all criminal actions. Such a holding would be merely the logical extension of a firmly established line of precedents. The objective would be achieved, yet it would not be necessary to upset *Baron v. Baltimore*.

A second line of attack is to use the reasoning of the Court in *creating* a right to counsel in the federal courts to support the same right in the state courts. Ordinarily, one does not speak in terms of the Supreme Court creating rights, but apparently this is exactly what the Court has done with respect to the right to counsel in federal courts.

The section in the first Federal Judiciary Act⁷³ that pertains to the right to the assistance of counsel is still on the statute books, with much of the original language still intact: "In all the courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein."⁷⁴ In the same manner, part of the first Federal Crimes Act⁷⁵ is still the law of the land:

Whoever is indicted for treason or other capital crime shall be allowed to make his full defense by counsel learned in the law; and the court before which he is tried, or some judge thereof, shall immediately, upon his request, assign to him such counsel, not exceeding two, as he may desire, who shall have free access to him at all reasonable hours.

70. See p. 217 *supra*.

71. 287 U.S. 45 (1932).

72. *Patton v. United States*, 281 U.S. 276, 298 (1930).

73. Act of September 24, 1789, c. 20, sec. 35, 1st Congress, 1st Session.

74. 28 U.S.C. § 1654 (1952).

75. Act of April 30, 1790, c. 9, sec. 29, 1st Congress, 2nd Session.

He shall be allowed, in his defense to make any proof that he can produce by lawful witnesses, and shall have the like process of the court to compel his witnesses to appear at his trial, as is usually granted to compel witnesses to appear on behalf of the prosecution.⁷⁶

To these sections, however, there has been added a third, *i.e.*, that which incorporated the Federal Rules of Criminal Procedure into statutory law.⁷⁷ Rule 44 provides that "if the defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or is able to obtain counsel."⁷⁸ The phrase "every stage of the proceedings" means all phases in court; thus, according to the Rules, it is not necessary to assign counsel at preliminary hearings. However, Rule 5 (b) provides that the hearing commissioner must inform the defendant of his right to retain counsel and that the commissioner must allow the defendant a reasonable amount of time to obtain counsel if he chooses to do so.⁷⁹

Thus, according to both the Constitution and the statutes (until the adoption of Rule 44) the right to the assistance of counsel, in theory at least, was a right to obtain counsel of one's own choosing and at one's own expense; assignment of counsel was not contemplated. The law required that counsel be assigned only in cases of treason or other capital offenses. Prior to *Powell v. Alabama*⁸⁰ few if any cases reached the United States Supreme Court that concerned the right of indigent defendants to have the assistance of counsel in criminal cases; it is necessary, therefore, to turn to the lower federal courts to determine what the right meant in practice, and here the practice was not at all uniform. Some courts appointed counsel if the defendant had none of his own and was charged with a serious offense. Other courts did not assign counsel unless the defendant expressly asked that the court do so. And few courts assigned counsel to a defendant who intended to plead guilty.⁸¹

In 1938 (ten years before Rule 44 had statutory implementation) the picture changed radically. Holtzoff correctly treats *Johnson v. Zerbst*⁸² as a *cause celebre* in the history of federal constitutional and criminal law.

76. 18 U.S.C. § 3005 (1952).

77. 18 U.S.C. § 3006 (1952).

78. Rule 44, without statutory support, became effective March 21, 1946.

79. Rule 40 (b) (1,2) accords the defendant the same right when (a) he is arrested with a warrant issued in another state at a place 100 miles or more from the place of arrest, or (b) he is arrested without a warrant for an offense committed in another state at a place 100 miles or more from the place of arrest.

80. 287 U.S. 45 (1932).

81. Holtzoff, *The Right to Counsel Under the Sixth Amendment*, 20 N.Y.U.L. REV. 7-8 (1944).

82. 304 U.S. 458 (1938).

The facts of this case are as follows: Johnson was charged with possessing and passing counterfeit \$20 Federal Reserve Notes on November 24, 1934. He was kept in jail for lack of bail until January 21, 1935, at which time he was indicted. On January 23rd he was given notice of the indictment, and the same day was arraigned, tried, convicted, and sentenced to four and a half years in the penitentiary. He had counsel at the preliminary hearing but was unable to employ counsel for the trial. On May 15, 1935 he filed application for appeal (still without counsel) but it was denied because it was filed too late. While in the penitentiary he twice filed for writs of habeas corpus, but these were denied by the district court, the judge holding that the proceedings depriving the petitioner of his constitutional right to the assistance of counsel were not sufficient "to make the trial void and justify its annulment in a habeas corpus proceeding, but that they constituted trial errors which could only be corrected on appeal." The circuit court of appeals affirmed the district court, whereupon the case was brought to the Supreme Court on certiorari. There, Mr. Justice Black said for the Court that ". . . the Sixth Amendment withholds from Federal Courts in *all* criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of Counsel."⁸³ The Court, in effect, held that where a defendant in a federal criminal proceeding is without counsel at the trial and does not effectively waive counsel, a judgment against such defendant is void because the trial court loses its jurisdiction.⁸⁴

As a result of this decision, the present practice in the federal courts is to ask the defendant if he is represented by counsel; if he is not, he is told of his right to have the assistance of counsel and asked if he desires the court to appoint counsel to assist him. If he replies affirmatively, the court first satisfies itself that the defendant is unable to employ his own counsel because of lack of funds, and then assigns counsel to represent him. If the defendant wishes to waive his right to counsel, the court is obligated to determine that the waiver is intelligently performed, and a notation is made in the record to that effect.

We are now in position to examine what the majority of the Supreme Court has itself said about the right to counsel in the federal courts. In a recent case coming from a state court, the Supreme Court noted that:

The practice in the federal courts as to the right of the accused to have the assistance of counsel is derived from the Sixth Amendment which expressly requires that, in all criminal prosecutions in the courts of the United States, the accused shall have the assistance of counsel for his defense. There is no proof possible that the same practice would

83. *Id.* at 463.

84. *Id.* at 468.

have developed had there been no specific provision on the subject in the Sixth Amendment. . . . Furthermore, at the time of the trial of his case in 1938, the rule of practice even in the federal courts was not as clear as it is today. The federal statutes were then, and they are now, in practically the same form as they were when they were enacted in 1789 and 1790. They provided merely for a right of representation in the federal courts by the accused's own counsel and required assignment of counsel only on accusations for treason or other capital crimes. In fact, *until the decision in this court in May, 1938 . . . in Johnson v. Zerbst, . . . there was little in the decisions of any courts to indicate that the practice in the federal courts, except in capital cases, required appointment of counsel to assist the accused in his defense, as contrasted with the recognized right of the accused to be represented by counsel of his own if he so desired.* (Emphasis added).⁸⁵

Yet, as we know, *Johnson v. Zerbst* declared that federal courts lose jurisdiction if a defendant does not have counsel and is unable to obtain counsel; from this it was held to follow that federal courts are required to appoint counsel to assist all indigent defendants. The rationale behind this reasoning has been cited elsewhere.⁸⁶ While the step is to be applauded, the fact remains that *the Supreme Court, of its own volition, has seen fit to create a right which was unknown to the Framers, and, in fact, was unknown all through our constitutional history until 1938 when the Court announced its decision.*⁸⁷ At this point, the words of Justice Douglas should be recalled: "I do not think that the constitutional standards of fairness depend upon what court an accused is in" ⁸⁸ Granted the Bill of Rights is not applicable to the states. The fourteenth amendment, however, is and *there is no more valid precedent for creating mandatory assignment of counsel for indigents in the federal courts than there is for those in the state courts.* If the Court creates a two-way street for stare decisis the majority cannot logically claim that it is required to travel only in one direction.

The criminal appellate court of Texas recently observed that:

. . . as applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. . . .

There is no escape from the conclusion that the Supreme Court of the United States has potential jurisdiction in all State cases where it is claimed by the accused that the conviction was based upon his involuntary confession. . . .

The difficult feature of our position rests in the fact that we are called upon to determine the question from a dual standpoint — first, under the laws and decisions of this State and second, under the decisions of the Supreme Court of the United States. . . .

85. *Bute v. Illinois*, 333 U.S. 640, 660-1 (1948).

86. Note 16, *supra*.

87. Rackow, *The Right to Counsel: English and American Precedents*, 11 THE WILLIAM AND MARY Q. 3 (1954).

88. *Bute v. Illinois*, 333 U.S. 640, 678 (1948). Dissent of Justice Douglas.

If the Supreme Court would prescribe some formula by which we may be guided, our task would be much easier. . . .⁸⁹

It is suggested that if a formula is adopted in "right to counsel" cases, it be Rule 44 of the Federal Rules of Criminal Procedure, at present applicable only to federal courts.⁹⁰

Much would be accomplished if the majority on the Court would recognize that the sixth amendment guarantees the right of an accused the assistance of counsel when the defendant employs his own, and that the right of an indigent defendant in the federal courts to have counsel assigned depends upon the due process clause of the fifth amendment.⁹¹ If this step were taken, it would be an easy matter to extend the right of assignment of counsel to indigent defendants in the state courts as an application of the due process clause of the fourteenth amendment.

The majority may then argue that we would be back to the "fair trial" rule. That may be, but we would be there on a different basis, because by definition the lack of counsel would make the trial unfair.

89. *Newman v. State*, 148 Tex. Crim. 645, 651-2 (1945).

90. There is little disagreement among the members of the Supreme Court on either the principle behind this rule or the application of the rule to specific cases.

91. FREUND, ON UNDERSTANDING THE SUPREME COURT, 34-5 (1949).